No. 86-814

In The
Supreme Court of the United States

October Term, 1986

WHITE MOUNTAIN APACHE TRIBE, et al.,
Petitioners,
v.
ARIZONA STATE DEPARTMENT OF TRANSPORTATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

THE DECEMBER 12, 1986, DECISION OF THE ARIZONA SUPREME COURT IN *CENTRAL MACHINERY COMPANY V. STATE OF ARIZONA* CONFIRMS THE NEED FOR SUPREME COURT RESOLUTION OF THIS CASE.

The nationwide importance of this decision uniquely disfranchising Indian rights from the remedies of 42 U.S.C. § 1983, including attorney's fees under 42 U.S.C. § 1988, is confirmed by the Arizona Supreme Court's December 12, 1986, decision in *Central Machinery Company v. State of Arizona,* No. 18493-PR *("Central Machinery II"),* printed in the Brief in Opposition, pp. 23-63. Following the Ninth Circuit's lead in this case, *Central Machinery II* goes further

and announces that *Maine v. Thiboutot,* 448 U.S. 1 (1980), has been overruled in part and declines to follow it, conceding as follows:

> Unquestionably, then, Central Machinery's suit vindicated an interest protected by federal law. . . .
>
> We do not doubt that Justice Brennan's majority opinion in *Maine,* standing alone, would justify a finding that Central Machinery's original action was cognizable under § 1983: [quotation omitted]. This broad language clearly would control the instant case where the State of Arizona's laws conflicted with federal laws designed to protect Indians. (Brief in Opposition, pp. 36, 38).

The Arizona Supreme Court alternatively holds that §§ 1983 and 1988 remedies may be denied even when federal statutes do create rights:

> Even assuming the Indian traders statutes created enforceable rights, however, we would not find the original action to be cognizable under § 1983. (Brief in Opposition, p. 54).

We are informed by counsel for the Tribe and Central Machinery Company that *Central Machinery II* will be brought here on petition for certiorari.

The clearest of conflicts is present. The Ninth Circuit decision in this case and the Arizona Supreme Court decision in *Central Machinery II* are in direct conflict with the New Mexico decision in *Ramah Navajo School Board, Inc. v. Bureau of Revenue,* 104 N.M. 230, 720 P.2d 1243 (Ct. App. 1986), *cert. denied,* 55 U.S. L.W. 3310 (U.S. Nov. 4, 1986).

The nationwide importance of this case is apparent. It is evidenced by the unusual circumstance that 39 states appeared as amici curiae in support of Arizona in the Ninth Circuit. Other Indian tribes are pursuing attorney's fees claims in litigation throughout the country which will be governed by the issues resolved inconsistently by these cases. (*See* Motion for Leave to File Brief and Brief Amici Curiae

of the Ak-Chin Indian Community [and 36 other tribes] p. 2, filed December 17, 1986, in this case.)

This case is worthy of certiorari on each of its three ascending levels of doctrinal and practical breadth. As an interpretation of the federal Indian timber laws it will preclude attorney's fees awards to other tribes which have successfully restrained state encroachment on Indian timber rights. *E.g., Hoopa Valley Tribe v. Nevins,* 590 F.Supp. 198 (N.D. Cal. 1984). As a methodology for disfranchising federal statutory rights of Indians from §§ 1983 and 1988 remedies, it threatens many Indian rights beyond timber rights. *Central Machinery II* is its first progeny of that sort. Finally, its transformation of *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981), into a device for limiting § 1983 to subsets of federal laws by the fiction of labelling actual rights as non-rights affects federal rights of every nature.

The petition for writ of certiorari should be granted. *

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* Arizona strains to disqualify Justice O'Connor, asserting that "this controversy began in 1968" when she was an Arizona Assistant Attorney General and that her husband's then law partner testified as the State's expert witness in 1981 "on both the legal propriety of attorney's fees and the reasonableness of petitioners' fee application." Brief in Opposition, p. 13 n.4.

This controversy did not begin in 1968. When Pinetop Logging Company began logging for the Tribe in 1968, Pinetop's attorneys fully disclosed its activity to the Arizona tax authorities, who agreed Arizona could not tax Pinetop. This was evidenced in a letter of October 8, 1968, confirming the State's and Pinetop's "understanding that the *Warren Trading Post Company* case (85 S. Ct. 1242) applies and that the Sales and Use Tax Department has no jurisdiction over this operation, either as to sales tax on timbering or as to use tax on equipment brought into the Indian Reservation for this purpose." (Court of Appeals Excerpts of Record, p. 178.) Justice O'Connor resigned her position with the Attorney General's Office and became a member of the Arizona State Senate on October 30, 1969. This controversy arose in 1971, when Arizona levied the taxes it had earlier conceded it had no jurisdiction to assert.

Attorney Philip E. von Ammon testified as the State's expert witness on valuation of legal services, but Arizona did not challenge on appeal Judge Craig's findings of fact on the value of the legal services rendered, and they have been no part of this controversy after 1981.

Arizona now seeks to expand Mr. von Ammon's role to touch matters before this Court, asserting that he "was the State's expert witness on . . . the legal propriety of attorney's fees. . . ." Brief in Opposition, p. 13 n.4. This is neither correct nor relevant. Expert witnesses may not testify on legal questions but only to "assist the trier of fact." Rule 702, Fed. R. Evid.

If these circumstances were capable of tainting a judge's impartiality, they would only favor the State. But the Tribe and Pinetop are not objecting to Justice O'Connor's participation. The governing duty here is the duty to sit, which "is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices of this Court as one judge may be substituted for another in the district courts." *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (Memorandum of Justice Rehnquist).

3.16.23

Respectfully submitted,

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January 1987